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June 25, 2014

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You are hereby notified that the Court has entered the following opinion and order:

2013AP846-CR

State of Wisconsin v. Daniel J. Breeze (L.C. # 2011CF80)

Before Blanchard, P.J., Lundsten and Kloppenburg, JJ.

Daniel Breeze appeals a judgment of conviction and an order denying postconviction relief. Breeze contends that the circuit court erroneously exercised its sentencing discretion by considering Breeze's scores on the COMPAS actuarial assessment. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2011-12).¹ We summarily affirm.

¹ All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

Breeze was convicted of armed robbery with threat of force, as a repeater. At the sentencing hearing, the State argued for a prison sentence. It pointed out that the COMPAS assessment done by the presentence investigation writer indicated that Breeze has a high risk for violent and general recidivism. Breeze argued for an imposed and stayed sentence with one year of jail time. The court sentenced Breeze to fifteen years of imprisonment, with six years of initial confinement and nine years of extended supervision. In reaching its sentencing determination, the court referenced Breeze's history of violent behavior, commenting that "the [COMPAS] showing the concerns or the high violent recidivism rate or risk, certainly that is significant."

Breeze moved for resentencing, contending the circuit court relied on an improper sentencing factor when it considered the COMPAS. The circuit court denied the motion, explaining that it did not rely on the COMPAS to determine that Breeze had a high risk for violent recidivism. Rather, the court explained, it had relied on Breeze's history of violence in determining that Breeze posed a high recidivism risk.

Breeze contends that the circuit court erroneously exercised its sentencing discretion by considering the COMPAS scores in determining Breeze's sentence. *See State v. Fuerst*, 181 Wis. 2d 903, 909-10, 512 N.W.2d 243 (Ct. App. 1994) ("Under the erroneous exercise of sentencing discretion standard, we presume that the trial court acted reasonably unless the defendant shows some unreasonable or unjustifiable basis in the record for the sentence. 'Unjustifiable bases for a sentence include irrelevant or improper considerations.'" (citations omitted) (quoted source omitted)). He points out that his PSI contains a warning that the attached COMPAS scores "are not intended to determine the severity of the sentence or whether an offender is incarcerated." Breeze argues that the COMPAS scores are not intended to be used

by a court for sentencing purposes, and thus the COMPAS scores are an improper factor. Breeze then contends that the court relied on the COMPAS scores in imposing Breeze's sentence, pointing to the court's statement that the scores were significant. Breeze also points out that the court adopted the recommendation of the Department of Corrections and the State, both of which referred to the COMPAS scores in their sentencing recommendations.

We conclude that Breeze has not established that the circuit court actually relied on the COMPAS scores in imposing Breeze's sentence. Accordingly, we need not address and express no opinion as to whether reliance on those scores would have been improper.

A circuit court properly exercises its sentencing discretion if it relies on relevant factors and explains how the sentence promotes the sentencing objectives. *State v. Gallion*, 2004 WI 42, ¶46, 270 Wis. 2d 535, 678 N.W.2d 197. The standard sentencing objectives include protection of the public, punishment, rehabilitation, and deterrence. *Id.*, ¶40. "Sentencing decisions are afforded a presumption of reasonability consistent with Wisconsin's strong public policy against interference with a circuit court's discretion." *State v. Harris*, 2010 WI 79, ¶3, 326 Wis. 2d 685, 786 N.W.2d 409. A court erroneously exercises its sentencing discretion if it "imposes its sentence *based on* or in *actual reliance upon* clearly irrelevant or improper factors." *Id.*, ¶30. A defendant bears the burden to prove actual reliance by clear and convincing evidence. *Id.*, ¶34. To meet that burden, the defendant must show that it is highly probable or reasonably certain that the circuit court actually relied on an improper factor. *Id.*, ¶35.

"Our obligation is to review the sentencing transcript as a whole, and to review potentially inappropriate comments in context." *Id.*, ¶45. Here, the sentencing transcript reveals that the circuit court addressed the standard sentencing factors and objectives, including the

gravity of the offense, Breeze's character and criminal history, and the need to protect the public. See *Gallion*, 270 Wis. 2d 535, ¶¶40-46. In the course of its sentencing comments, the court made one reference to the COMPAS scores, in the context of discussing the court's view of Breeze's history of violence and recidivism risk. The court said:

You know, I don't—I know there is some reference of these, well, behaviors being stupid. There is something to that. But they're not just stupid; I mean, they're violent. It goes beyond being stupid. And that's the difficulty. I mean, these weren't stupid crimes, they're [not] just simple misdemeanors, didn't think before you did something.

You know, I'm looking at the previous record, and one of the things that sticks out at me is the actions with the officer, I think, in the resisting or the reference that his violent behavior with the Officer Guralski certainly, you know, *the [COMPAS] showing the concerns of the high violent recidivism rate or risk, certainly that is significant*. This isn't the first I am going to say violent crime that Mr. Breeze has committed.

(Emphasis added.) It is clear from a review of the sentencing transcript as a whole that the court based its sentencing determination on the seriousness of the offense and Breeze's history of violence, not on the COMPAS scores.

Additionally, the circuit court clarified its statements during postconviction proceedings. See *Fuerst*, 181 Wis. 2d at 915. The court explained that it did not need the COMPAS scores to determine Breeze's risk of violent recidivism, but rather determined Breeze had a high risk of violent recidivism based on his criminal history. The court stated that it determined that probation was not appropriate in this case based on the seriousness of the offense and Breeze's criminal history, and that the court's decision had nothing to do with the COMPAS scores.

Although a circuit court's disclaimer of reliance on identified information is not dispositive, in this case, our review of the record supports the court's determination. See *State v.*

Groth, 2002 WI App 299, ¶28, 258 Wis. 2d 889, 655 N.W.2d 163 (“A postconviction court’s assertion of non-reliance on allegedly inaccurate sentencing information is not dispositive. We may independently review the record to determine the existence of any such reliance.” (citation omitted)), *abrogated on other grounds by State v. Tiepelman*, 2006 WI 66, ¶2, 291 Wis. 2d 179, 717 N.W.2d 1. As explained above, the sentence transcript as a whole supports the accuracy of the sentencing court’s postconviction assertion of non-reliance. Thus, Breeze has not established that the sentencing court relied on improper information at sentencing.

Therefore,

IT IS ORDERED that the judgment and order are summarily affirmed pursuant to WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals